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In the Supreme Court of the United States

OCTOBER TERM, 1979

SCM CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 78a-79a) is reported at 612 F. 2d 707. An earlier opinion of the court of appeals (Pet. App. 51a-65a) is reported at 565 F. 2d 807. The order and opinion of the Federal Trade Commission (Pet. App. 68a-77a) are reported at 92 F.T.C. 416. An earlier opinion and order of the Commission (Pet. App. 32a-50a) are reported at 89 F.T.C. 60. The decision and order of the administrative law judge (Pet. App. 4a-26a) are reported at 89 F.T.C. 46.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1980. The petition for a writ of certiorari was filed on April 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 8 and 11 of the Clayton Act, 15 U.S.C. 19 and 21, are set forth in the Appendix to the petition (Pet. App. A-4 to A-6). Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), are set forth in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether Sections 8 and 11 of the Clayton Act empower the Federal Trade Commission to terminate and prevent interlocking directorates among competing corporations by issuing orders against offending corporations as well as offending directors.

2. Whether the Commission abused its discretion by ordering petitioner to cease and desist from maintaining interlocking directorates with competing corporations after the offending interlock was terminated.

3. Whether differences between a consent order negotiated by another corporation involved in petitioner's violation and the adjudicated order entered against petitioner establish unconstitutional discrimination.

STATEMENT

In June 1975, the Federal Trade Commission issued an administrative complaint against petitioner SCM Corporation, Kraftco Corporation, and Richard C. Bond, alleging, *inter alia*, that each of them had violated Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) by virtue of Bond's service on the boards of directors of both SCM and Kraftco.[1] Soon after the Commission

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[1]Kraftco and SCM compete directly in the sale of various food products. In fiscal 1975, SCM sold more than $83 million of food

issued its complaint, Bond resigned from SCM's board. Kraftco and Bond subsequently consented to the entry against them of cease-and-desist orders (Pet. App. 36a-37a). SCM admitted that a violation of Section 8 had occurred, but contested the complaint against it on the theory that Section 8 does not apply to corporations. SCM tendered a statement, however, which indicated that it would not rehire Bond so long as SCM and Kraftco continue to compete (Pet. App. 44a n.5).

The complaint against SCM was litigated upon a stipulated record before an administrative law judge. The administrative law judge found that SCM had violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act (Pet. App. 37a). The Commission affirmed the administrative law judge's finding and entered a cease-and-desist order based upon both statutory provisions (Pet. App. 36a-50a).

On SCM's petition for review, the court of appeals held (1) that Section 8 of the Clayton Act applies to corporations as well as natural persons; (2) that the Commission had not abused its discretion by entering an order against SCM following Bond's resignation and SCM's statement that it would not rehire Bond; (3) that there was evidence establishing a danger of recurrent violations by SCM; and (4) that the Commission had properly entered an order against SCM that differed from, and in some respects was more burdensome than, the negotiated consent order entered against Kraftco (Pet. App. 57a-59a, 61a-62a, 64a-65a).

The court of appeals expressed concern, however, about a statement in the Commission's opinion indicating that SCM had the burden of proving that a remedial

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products in competition with Kraftco. Kraftco's sales of the same products, in competition with SCM, were approximately $258 million (Pet. App. 52a, 37a).

order was unnecessary in this case.[2] It concluded that the imposition of such a burden might be proper with respect to SCM's claim that the proceeding was moot, but would be improper with respect to SCM's claim that injunctive relief was unwarranted because there was no danger of recurrent violations (Pet. App. 62a).[3] Because the court believed that the Commission "may have applied the wrong legal standard in entering a cease and desist order against SCM" (Pet. App. 51a-52a), it remanded the case to the Commission (Pet. App. 62a). While the court rejected SCM's contention that the record was insufficient to support the entry of a cease-and-desist order, it directed that the parties "should be given an opportunity upon remand to address themselves to the issue whether 'there exists some *cognizable* danger of recurrent violation' " (Pet. App. 62a & n.18).

On remand, the Commission reopened the proceeding to determine whether there was a cognizable danger of a recurrent violation by SCM (Pet. App. 72a-73a). The Commission thereafter issued an opinion stating that it "adhere[d] to [its] earlier conclusion that an order is necessary [because] there is plainly a cognizable danger of recurrent violation of Section 8 of the Clayton Act in this case" (Pet. App. 74a). Accordingly, the Commission entered an order against SCM identical to its prior order (compare Pet. App. 32a-35a with Pet. App. 68a-71a).

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[2]The Commission had stated (Pet. App. 46a):

> Respondent's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order.

[3]SCM had advanced a mootness argument before the Commission but abandoned that argument on appeal (Pet. App. 60a-61a).

On SCM's petition for review, the court of appeals held in a per curiam opinion that the Commission had applied "the correct legal standard" in imposing a remedial order. The court explained that it had already held that "the record is sufficient to justify the imposition of the Commission's order," and that SCM's remaining objections "were also conclusively resolved in the prior opinion of this court" (Pet. App. 79a).

ARGUMENT

The decision of the court of appeals conflicts with no decision of this Court or any other court of appeals. The decision is correct, and further review by this Court is not warranted.

1. Petitioner contends (Pet. 7-9) that corporations are not subject to remedial orders under Sections 8 and 11 of the Clayton Act, 15 U.S.C. 19 and 21. The initial decision of the court of appeals, on which we principally rely, correctly rejected that contention (see Pet. App. 53a-59a).

The plain meaning of the language used by Congress in Sections 8 and 11 of the Clayton Act supports the conclusion of the court of appeals. Section 8 of the Act provides, *inter alia*, that no person shall serve as a director of two or more corporations engaged in commerce, if one of the corporations has capital surplus and undivided profits aggregating more than $1 million and if the corporations are competitors. Section 8 does not, on its face, specify whether individual directors alone are liable to remedial orders if they violate the statute, or whether corporations involved in forbidden interlocks are likewise liable. However, Section 11 of the Act clearly establishes that corporations are liable for violations of Section 8. Section 11 states that, upon finding a violation of Section 8, the Commission may issue "an order requiring such person to cease and desist from such

violations, *and * * * rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act*" (emphasis supplied). 38 Stat. 735, 15 U.S.C. 21(b) (emphasis supplied). Section 1 of the Clayton Act, 15 U.S.C. 12, expressly provides that the word "person" includes "corporations."

Sections 1, 8 and 11 of the Clayton Act are *in pari materia* and must be read together to ascertain the statute's meaning. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). To adopt petitioner's construction and limit the statute to natural persons would deprive Sections 1 and 11 of their plain meaning "in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). Giving the words used by Congress their ordinary meaning and considering their interrelationship, it is plain the Congress intended not only to prohibit individuals from serving on interlocking boards, but also intended to prohibit corporations from selecting individuals to serve who are disqualified by the provisions of Section 8.[4]

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[4]Contrary to petitioner's assertion (Pet. 7-10), the court of appeals did not base it decision on its own "policy" views. To the contrary, the court expressly stated (Pet. App. 58a) that its decision was "based upon the interrelationship of various sections of the Clayton Act, the policy of the statute, the legislative history and the Commission's long-standing administrative practice * * *." The legislative history (summarized at Pet. App. 57a-58a, 38a-39a & n.2) reinforces the plain meaning of the statutory language. For example, the House Report that accompanied the Clayton Act stated that Congress believed that a two-year grace period was required "in order that the corporations affected may have ample time to readjust their boards of directors * * *." H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). The Committee was thus of the view that it was incumbent upon corporations themselves to achieve compliance with the requirements of Section 8.

A contrary interpretation would conflict with the purpose of Section 8, which was intended "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates" (Pet. App. 57a, quoting *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)). The court of appeals thus correctly affirmed the Commission's conclusion that (Pet. App. 41a, 55a-56a):

> To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

Every other court that has considered this question has reached the same result. See *United States* v. *Crocker Nat'l Corp.*, 422 F. Supp. 686, 705-706 (N.D. Cal. 1976); *United States* v. *Sears, Roebuck & Co.*, *supra*; see also *United States* v. *Sears, Roebuck & Co.*, 165 F. Supp. 356, 357-359 (S.D.N.Y. 1958); *United States* v. *Sears, Roebuck & Co.*, [1952-1953 Transfer Binder] Trade Cas. (CCH) para. 67,561. Cf. *Protectoseal Co.* v. *Barancik*, 484 F. 2d 585, 588 (7th Cir. 1973) (noting that "[t]he corporation

itself is a potential defendant in litigation which the government may initiate to enforce § 8").[5]

2. Petitioner also argues (Pet. 10-13) that the court of appeals improperly affirmed the remedial order in this case because the record does not establish the need for a remedy. However, the court of appeals correctly held (Pet. App. 79a, 59a-62a) that the Commission's decision to issue a cease-and-desist order was not an abuse of discretion under *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953). *Grant*, like the present case, involved illegal interlocking directorates. The district court dismissed the complaint after finding that the illegal interlock had been eliminated and that there was not "the slightest threat that the defendants will attempt any future activity in violation of Section 8" (*id.* at 630-631). On direct appeal to this Court, the government contended that an injunction was appropriate because the defendant failed to remedy the violation over a five-year period and did not do so until a complaint was filed. The government also pointed to the defendant's failure to concede the illegality of the interlock and to give assurances against a repetition of the violation (*id.* at 633-634). This Court held that such arguments may well be persuasive at the trial court level, but were not a ground for disturbing the remedial discretion of the trial court on appeal (*ibid.*).

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[5]In any event, even if there were merit to petitioner's claim that only natural persons are subject to remedial orders under Sections 8 and 11 of the Clayton Act, the order against petitioner in the present case is sustainable on an independent statutory basis. The Commission found that the challenged director interlock violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). See Pet. App. 42a-44a. Corporations are clearly subject to remedial orders under that provision. See, *e.g.*, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320-321 (1966); *Grand Union Co.* v. *FTC*, 300 F. 2d 92, 94 (2d Cir. 1962). Petitioner does not challenge the Commission's determination that it violated Section 5 of the Federal Trade Commission Act.

The stipulated record in the present case shows that petitioner's violation of Section 8 continued for several years and ended only after the Commission issued a complaint challenging the interlock (Pet. App. 8a-9a, 44a, 52a-53a, 74a). The record also shows that the extent of competition between Kraftco and petitioner is substantial (*ibid.*), and that petitioner, which could violate the law again by entering into another interlocking directorate, has refused to make any binding commitment not to do so in the future. Indeed, petitioner persists in the view that corporations have no responsibility to comply with Section 8 of the Clayton Act. In view of this evidence, and petitioner's refusal to present contrary assurances indicating that a remedy is unnecessary (Pet. App. 75a-76a), the Commission correctly found "a degree of disregard for the law's requirements that demands [a] remedy" (*id.* at 75a), and properly noted that petitioner's conduct in this case only added to the "concern that [petitioner] may again violate the law" (*ibid.*).

As the court of appeals found (Pet. App. 62a n.18), the record in this case is sufficient "as a matter of law to support a grant of injunctive relief" under *W.T. Grant*. It was for the Commission, in the exercise of its sound discretion, to weigh the competing considerations bearing on the risk of a recurrent violation (*ibid.*). Like the decision of the district court in *W.T. Grant*, the decision of the Commission may be overturned only if the record evidence does not reasonably sustain it. This essentially factual question was carefully analysed by the court of appeals. Since both the Commission and the court of appeals applied the *W.T. Grant* standard to the facts of this particular case, there is no reason for this Court to consider whether the findings of the Commission, as affirmed by the court of appeals, were erroneous. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48

(1960); *Fedders Corp.* v. *FTC*, 529 F. 2d 1398, 1403 (2d Cir.), cert. denied, 429 U.S. 818 (1976); *William H. Rorer, Inc.* v. *FTC*, 374 F. 2d 622, 625-626 (2d Cir. 1967); *Coro, Inc.* v. *FTC*, 338 F. 2d 149, 153-154 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965).

3. Petitioner finally argues (Pet. 14-16) that certain differences between the consent order negotiated by Kraftco and the adjudicated order ultimately entered against petitioner manifest unconstitutional discrimination by the Commission.

With the benefit of full briefing on this issue, the court of appeals has twice considered the differences between the Commission's adjudicated order against petitioner and the consent order against Kraftco, and has concluded that the differences are not legally material and are fully justified (Pet. App. 63a-65a & nn.19-23, 79a). As the court of appeals explained (*id.* at 64a-65a):

> After a thorough comparison of the orders involved here, we find the differences not sufficiently substantial to raise [a] constitutional question, especially in light of the FTC's broad discretion in drafting remedial orders. * * * Moreover, the differences between the orders are not arbitrary or irrational in light of the facts before the FTC * * *.[6]

The court observed that Richard Bond had served on Kraftco's board before serving on petitioner's board, and that petitioner therefore was in a better position than Kraftco to avoid the interlock in the first place. The court also noted that Kraftco had been conciliatory throughout this litigation and displayed a willingness to avoid future

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[6]Petitioner has not contended that the Commission's remedial order, which requires the prevention of future illegal interlocks, places the company at a competitive disadvantage in the marketplace.

infractions, while petitioner had been unwilling to assure the Commission that it would avoid unlawful interlocks in the future. Indeed, petitioner was unwilling to "disclose[] what steps, if any, had been taken to achieve that end" (Pet. App. 65a).

The decisions of this Court establish that the Commission possesses broad discretion in fashioning remedies that are suited to the facts of particular cases. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946). And it is also well established that the Commission need not impose identical sanctions even against similarly situated violators. See, *e.g.*, *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); see also *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-189 (1973). These principles support the court of appeals' conclusion that the Commission did not abuse its discretion by adjusting its remedy to the necessities of the present case.

In any event, there is no substance to petitioner's assertion that the terms of adjudicated orders must be the same as those of consent orders in related cases. Consent orders are the product of negotiation and compromise. "[I]n exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 233, 235-237 (1975). In contrast, an adjudicated order is expected to provide complete relief "to prevent the evils aimed at by the original complaint." *United States* v. *Armour & Co.*, *supra*, 402 U.S. at 681. Cf. *United States*

v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326-327, 354 (1961). Thus, the differences that exist between the consent order and the fully litigated order involved here reflect the implementation of sound enforcement principles, not unconstitutional discrimination.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]In reliance on decisions arising in the criminal law context (Pet. 14), petitioner claims that it is a violation of the Due Process Clause to impose a more stringent remedial order on a party that goes to trial than a party that settles its dispute with the government. However, this Court has recognized that the "give and take" of negotiation often result in differences between sanctions imposed against parties who settle and those who exercise their right to trial. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363-365 (1978); *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-224 (1978).

APPENDIX

1. Section 1 of the Clayton Act, 15 U.S.C. 12, provides in pertinent part:

* * * * *

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * *

2. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.